88-2108

No. _____

Supreme Court, U.S.
FILED
APR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1988

ALBERT A. SIMAY AND FLORA L. SIMAY, PETITIONERS,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Albert A. Simay

ALBERT A. SIMAY
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PALM DESERT,
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Petitioner

Flora L. Simay

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QUESTIONS PRESENTED

1) Did the District Court Judge err in denying the Petitioners their right to a jury trial under Title 28 USC, Section 1346 (a)(1), when the demand for jury trial was properly stapled to the complaint when filed with the court? Confirmed for by Respondent's attorney. (Pretrial transcript page 24, lines 17-22. April 15, 1985.)

2) Did the Ninth Circuit Court of Appeals err in denying the Petitioners their constitutional rights to a jury trial when the IRS fraud on disability pay was alleged as a defense, action against the U.S. to recover money allegedly illegally collected under Internal Revenue Laws - peculiarly one to be decided by a jury? (Ahlinger v. U.S., DC Idaho 1955, 135 F Supp 40.)

3) Did the District Court Judge err in denying Petitioners the right to submit two motions? (U.S. v. Bernzold Realty Co. [1962], SDNY 211 F Supp 934 Affdd [Ca 2N4] 316 F 2d 240, Cert ben 375 U.S. 830, 11 L Ed 2d 61, 84 Sct. 75.)

4) Did the District Court Judge deny the Petitioners the right of discovery since the IRS does not have Petitioners' 1979 tax file or had never billed Petitioners for the tax assessments from 1979-1984 on disability pay?

5) Did the District Court Judge deny the Petitioners the right of discovery when the Complaint referred to single action via correspondence which had various parts? (Lehnerz v. Societe Anonyme Belge D. Exploitation De La Monegaton Aerienne, D.C. N.Y. 1948, 8FRD 319.)

6) Did the District Court Judge deny Petitioners newly discovered evidence on disability by due diligence which could not have been discovered in time to move for a new trial under 59 (b)?

7) Does a Court of Appeals abuse its discretion in making an independent examination of the record to determine if a plaintiff, in making conclusory allegations of a conspiracy on disability has stated a cause of action under 42 USC § 1983,

particularly where pretrial discovery as to the conspiracy has not been completed?

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners petition for a Writ of Certiorari to review judgment of the United States Court of Appeals for the Ninth CirCuit in this case. No. 8-7-6188.

OPINIONS BELOW

The opinion of the Court of Appeals (D.C. No. 85-1060 N [IRFG] Civil) is not reported. The opinion of the district court (Docket No. 85-1060 N [IEG]). Stay of mandate pending petition for writ of certiorari to United States Supreme Court is granted. See Appendix.

JURISDICTION

The judgment of the Court of Appeals (No. 87-6188) has not as yet been served on Albert A. Simay. Mrs. Simay received her notice January 17, 1989. The jurisdiction of this Court is invoked under 28 USC, Section 1346 (a)(1). Motion: To stay issuance of mandate pending application to Supreme Court for Writ of Certiorari [28 USC 2101 (f); FRAP 41 (b)] January 30, 1989.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Albert A. Simay and Flora L. Simay, and Respondents, United States of America, Internal Revenue Service, William S. Rose, Jr., Robert Messick and Karen L. Stifter.

The Respondent before this Court include William S. Rose, Jr.

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REASON FOR GRANTING THE WRIT

I. The decision below conflicts with all relevant prior judicial interpretations of Title 28 USC Section 1346 (a)(1) and 1954 Amendment Act, July 30, 1954; Tax Reform Act 1986; Taxpayers Bill of Rights; 7th Amendment to the Constitution.

STATUTE INVOLVED

1) Title 28 USC Section 1346 (a)(1)

2) 1954 Amendment Act, July 30, 1954

3) Rule 59 (b)

4) Tax Reform Act 1986

5) Tax Payers Bill of Rights

6) IRS Ruling: Letter Ruling 86 300 20

7) Title 26 Section 104 (a)(1)

8) 7th Amendment to the Constitution

STATEMENT OF THE CASE

The IRS requested to audit Mrs. Simay's disability pay April 16, 1982. The IRS later requested to audit education expenses June 16, 1982.

> Mr. Matsueda only asked if Social Studies was taught. The reply was "yes". Mr. Matsueda therefore stated that it was not necessary to audit the education expenses and so he did not do so.

The Petitioners' Complaint 85-1060-N (IEG) was properly filed April 12, 1985, with a demand for a jury trial permanently attached to the Complaint.

Demand was timely when filing the Complaint. (U.S. v Friedland, D.C. Cnn 1950, 94F Supp 721.)

During the February 9, 1987 pretrial hearing the Respondent's Attorney stated a jury trial was demanded. (February 9, 1987 Reporter's Transcript of Proceedings page 24, lines 17-22) Title 28 USC Section 1346 (a)(1).

Taxpayer, by paying income tax assessments and suing for refund, may have his jury trial. (1954 Amendment Act, July 30, 1954, June 25, 1948 C646, 62 Stat. 971; July 30, 1954, C648 § 2(a), 68, Stat 589.)

During the pretrial conference the Petitioners were to prepare the Pretrial Order with two motions included. The Pretrial Order was prepared but the IRS attorney refused to sign the Order. A letter with the Pretrial Order was sent to the trial judge for his signature so that it could be filed. He did not answer or sign the Order. But the docket shows a Pretrial Order filed the the IRS attorney. The District Court Judge denied the Pretrial. During the April 16, 1987 trial why were the Petitioners denied the motions? (Plantiff's Trial Brief, page 4, lines 14-21.) The Petitioners attempted to obtain

the right of discovery as to why they were being assessed interest and penalties. The IRS' frivolous correspondence prior to trial and during the trial insisted that the IRS does not have the Petitioners' 1979 tax file. The IRS never billed or informed the Petitioners why they were assessed interest and penalties.

> The Petitioners' Complaint clearly states, "that this complaint is brought to seek recovery of taxes and interest erroneously and illegally assessed and collected against Plaintiffs by the Commissioner of Internal Revenue, an agent of Defendant United States of America."

The Complaint could only chronicle the correspondence between the IRS and themselves. It was not until near the end of the trial when the Respondent's attorney introduced a forged copy of Petitioners' Form 870 (illegal assessment of Mrs. Simay's disability pay) showing a forged $881.69 interest assessment on Mrs. Simay's disability pay. This forged IRS Form 870 informed the Court

and Petitioners how the IRS illegally collected the overpayment of taxes. The Petitioners stated in cross-examination that the forged IRS Form 870 introduced into evidence was therefore the crux of all the overpayment of taxes and an important part of the trial for overpayment of taxes. (Reporter's Transcript of Proceedings page 126, lines 15-17.) Teacher's disability pay is non-taxable. Title 26 Section 104 (a)(1); IRS Ruling: Letter Ruling 86 300 20.

The forged Form 870 revealed to the Court as well as to the Petitioners that:

1) There was a bookkeeping error on the part of the IRS; Or

2) Employees of the IRS illegally assessed Mrs. Simay's disability pay.

This newly discovered evidence by diligence could not have been discovered in time to move for a new trial under Rule 59 (b).

The basis for overpayment of taxes therefore had never been allowed by the Courts to be addressed.

The Ninth Court of Appeals denied Petitioners' Motion for Leave to File Appeal Under the Freedom of Information Act. It was imperative to clarify the reasons the IRS illegally assessed the Petitioners.

Also, the IRS showed questionable judgment when they cashed the December 9, 1982 bond check (4th quarter prepayment of 1982 tax) and 9 months later informed the Petitioners that the funds were applied to 1979 taxes for interest on disability pay. (Title 28 USC Section 2006.)

By Court Order of Honorable Irma E. Gonzales, (Motion: To Compel Production of Documents after Rejected Request January 16, 1987) the IRS gave the Petitioners Exhibit CR29 "Certificate of Assessment and Payments for periods ending December 31, 1980 and December 31, 1982." The December 9, 1982, 4th quarter prepayment of 1982 tax, bond check was never credited to Petitioners' account; substantiating the IRS bookkeeping error of assessments for 1982 to 1984 on Mrs. Simay's disability pay.

CONCLUSION

For the above reasons, this petition for Certiorari should be granted. Petitioners reiterate that they have attempted in good faith to prepare their Plaintiff's Case. However, such efforts are frustrated when the Defendant has stonewalled relevant discovery. The New Mexico Supreme Court has stated:

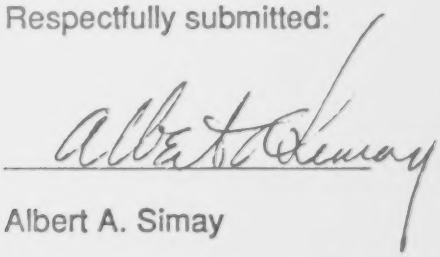
> We are not only concerned with the Constitutional right of the defaulted party to any opportunity to be heard on the merits, but also, with the equally sentimental constitutional right of the party who seeks discovery to a hearing which a willful bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants. (United Nuclear Corp. v General

Atomic Co., 96 N.M. 155 629 P. 2d

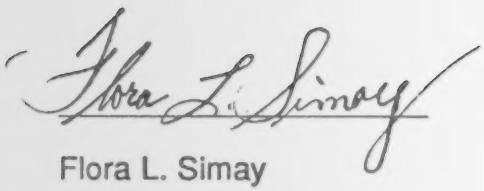
231, 317 [1980])

If the Petitioners were correct in urging that the Ninth Circuit had no "pendant appellate jurisdiction" to resolve that issue, the matter should be remanded to the District Court for appropriate disposition by jury trial.

Respectfully submitted:



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Dated: March 29, 1989

APPENDIX

1) Title 28 USC Section 1346 (a)(1):

Any action against the United States under Section 1346 (a)(1) shall, at the request of either party to such action, be tried by the court with a jury trial.

Taxpayer, by paying income tax assessments and suing for refund, may have his jury trial.

2) IRS Ruling: Letter Ruling 86 300 20:

The disabled teacher's salary is tax free, because worker's compensation payments are tax free .....

3) Kelly v U.S., C.A. 1 (N.H.) 1986, 789, F2d 94:

District Court's dismissal of taxpayers' action for refund of income tax did not deprive taxpayer of right to jury trial .....

4) Motion: (Plaintiffs' Trial Brief, page 4 lines 14-22):

A writing is not necessary when the motion is made during a hearing or trial (53) and there is authority that even at other times resort to oral motion may be allowed when the opposing party does not object (54).

(53) § 62362 infra

(54) U.S. v Berngold Realty Co (1962) SDNY 211 F Supp 934 affdd (Ca 2 NY 316 F 2d 240, Cert ben 375, U.S. 830, 11 L Ed 2d 61, 84 Sct 75

5) Ahlinger v U.S. D.C. Idaho 1955, 135 F Supp.40:

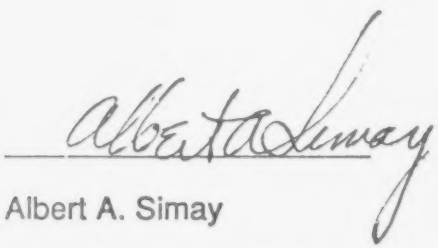
Their fraud was alleged as a defense, action against the U.S. to recover money allegedly illegally collected under Internal Revenue Laws was peculiarly one to be decided by a jury.

6) Tax Reform Act of 1986:

The IRS was given the authority to abate interest charges that are generated by its own errors or delays or bookkeeping.

CERTIFICATE OF SERVICE

I, Albert A. Simay, hereby certify that on the 6th day of March 1989 three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage, prepaid to WilliamS. Rose, Jr., Counsel for all Respondents herein. I further certify that all parties required to beserved have been served.



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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALBERT A. SIMAY and	)	Civil No. 85-1060-N
FLORA L. SIMAY,	)	
Plaintiffs,	)	
	)	
v.	)	JUDGMENT
	)	
UNITED STATES OF	)	
AMERICA,	)	
Defendant.	)	
_____	)	

This action came on for trial before the Court, the Honorable Leland C. Nielsen, Senior District Judge presiding, and the issues having been duly tried and decision rendered,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing, the action be dismissed on the merits, and that

defendant United States of America recover from the plaintiffs its costs of action.

Dated: May 21, 1987.

LELAND C. NIELSEN,
Senior United States
District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT A. SIMAY and	)	
FLORA L. SIMAY,	)	No. 87-6188
	)	
Plaintiffs-Appellants,	)	D. C. No. 85-1060-N
	)	(IRG) Civil
vs.	)	
	)	ORDER
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee,	)	
	)	
_____	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALBERT A. SIMAY and FLORA L. SIMAY, Plaintiffs,	)	Civil No. 85-1060-N
v.	)	JUDGMENT
UNITED STATES OF AMERICA, Defendant.	)	

This action came on for trial before the Court, the Honorable Leland C. Nielsen, Senior District Judge presiding, and the issues having been duly tried and decision rendered,

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Dated: May 21, 1987.

LELAND C. NIELSEN,
Senior United States
District Judge

2. In October 1981, the Internal Revenue Service examined the 1979 return, disallowed the educational and travel expenses, and on December 27, 1982, issued a statutory notice of deficiency for additional taxes, penalties and interest in the amounts of $2,330.00, $116.00 and $881.69, respectively.

3. During the pendency of the examination, plaintiffs made two payments in the amount of $2,446.00 and $4,000.00 to the Internal Revenue Service, which were applied toward satisfaction of the 1979 tax liabilities and which resulted in an eventual overpayment and issuance on February 7, 1983, of a refund to plaintiffs in the amount of $2,899.55.

4. On January 3, 1963, plaintiffs filed an amended 1979 personal income tax return, again claiming the educational and travel expenses, this time in the additional amount of $11,731.00. The Internal Revenue Service again disallowed the expenses.

5. Plaintiffs did not file an administrative claim for refund with respect to the tax year 1983.

6. On April 15, 1985, plaintiffs brought the instant refund suit seeking a refund of taxes for the years 1979 and 1983 in the sum of $5,486.22, of which $4,155,62 allegedly arises from disallowance of the 1979 educational and travel expenses.

7. Since 1956, plaintiffs were employed in various capacities with various educational institutions, and since that time Mr. Simay has obtained a masters degree and doctorate degree.

8. From 1956 to 1958, plaintiffs were teachers with the United States Air Force Schools in England. During that time, plaintiffs traveled throughout various European countries and gathered materials which they incorporated into their courses of study.

9. Since 1959 plaintiffs were employed with the Desert Sands Unified School District. Prior to 1976 Mr. Simay was the superintendent of finance or business management for the School District. In 1976 Mr. Simay was assigned as the sole teacher of the Learning Center at Indio High School. Mrs. Simay was an English teacher for grades 9 through 12.

10. In 1974, Mrs. Simay developed a thyroid problem and an exophthalmic condition of the eyes which prevented her from grading papers. In 1975, Mrs. Simay had hoped to get a position in the French Department, but was never given the opportunity to teach French. In 1976, Mrs. Simay went on sick leave and did not return to work. In 1977 or 1978, Mrs. Simay applied for disability, which was granted in 1980. In 1979, Mrs. Simay was unemployed.

11. From June through August, 1979, plaintiffs traveled throughout Europe. They did not travel with a group but, instead, traveled alone on their own itinerary. In June of 1979, plaintiffs flew to England, where they had once lived.

12. During the month of July, 1979, plaintiffs took an intensive course in the language of French at the de L' Universite' Catholique D'Angers. At the conclusion of the course, Mrs. Simay received from the university a certificate acknowledging her successful completion of the course.

13. Plaintiffs also traveled throughout Scandinavia; to Denmark, Sweden, Finland and Norway.

14. While traveling in Scandinavia, plaintiffs gathered posters and chatted with people. In Norway, they visited the waterfront and cottage industries.

15. Plaintiffs also visited the Netherlands and Brussels where they again obtained travel posters and information regarding its economy. Plaintiffs traveled to Spain and Portugal but, because of the language barrier, had little success in obtaining information while there. In the middle of August, plaintiffs returned to the United States.

16. Upon their return to the United States, plaintiffs did not discuss their trip abroad with anyone at Indio High School, did not prepare a written report or make any type of presentation, nor did they submit to Mr. Simay's employer a request for reimbursement of their travel and educational expenses.

17. Plaintiffs' trip to Europe was not required by Mr. Simay's employer, nor were any other employees of Indio High School ever required to take a trip abroad.

18. Mr. Simay continued to teach until his retirement, in 1980, at the Indio High School Learning Center, a facility created as a repository for students with disciplinary problems. Mr. Simay's prior experience as principal for Juvenile Hall, a facility for all delinquent children in Los Angeles, California, proved valuable in directing the Learning Center.

19. At any one time, Mr. Simay, as sole teacher of the Learning Center, would supervise 25 to 60 students covering grades 9 through 12. Mr. Simay's function was to continue teaching those subjects which the students were being taught just prior to their removal from their regular classrooms. Because of the limitations on the physical facilities, however, certain subjects were not carried over to the Learning Center curriculum. The curriculum focused primarily on basic courses of study, such as English, world geography, history, and math, and was taught primarily with programmed workbooks.

20. Based upon the evidence, plaintiffs' travels throughout Europe were primarily recreational in nature, bearing no direct and specific relationship to Mr. Simay's skills as a teacher at the Learning Center.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred on this Court by Section 1346 (a)(1) of Title 28 of the United States Code (28 U.S.C.) and Section 7422 (a) of the Internal Revenue Code of 1954 (26 U.S. C.).

2. A jurisdictional prerequisite to a refund suit for taxes under 26 U.S.C. Section 7422 (a) is the filing of an administrative claim for refunds. See Sections 6532 (a)(1) and 7422 (a); United States v. Freedman 444 F.2d 1387, 1388 (9th Cir. 1971), cert. denied, 404 U.S. 992 (1972). See also United States v. Marshall 526 F.2d 1349 (9th Cir. 1976); Kelly v. Springett, 527 F.2d 1090 (9th Cir. 1975). Although plaintiffs have filed a claim for refund with respect to the tax year 1979, no such administrative claim has been filed with respect to the tax year 1983. Accordingly, the Court has jurisdiction only over the suit for refund of taxes for the year 1979.

3. Treasury Regulations on Income Tax (1954 Code), Section 1.162-5 (26 C.F.R.) places a substantial burden on the taxpayer to demonstrate that travel and educational expenses qualify as ordinary and necessary business expenses. Krist v. Commissioner, 483 F.2d 1345, 1348 (2d Cir. 1973). In order for a deduction for travel expenses to be allowed under 26 U.S.C. Section 162 (a), there must be an identification of the particular job skills that are improved through the travel. Id. at 1350.

4. Recognizing that all travel has some educational value, the test under 26 U.S.C. Section 162 (a) is, thus, whether the travel bears a direct and substantial relationship to the improvement of the traveler's particular skills. Id. at 1351. See also Cardoza v. Commissioner 13 T.C. 3 (1951); Statton v. Commissioner, 28 T.C.M. 1278, T.C. Memo. 1969-250 (CCH), Dec. 29, 847.

5. As a matter of law the educational and travel expenses incurred by plaintiffs are not deductible under 26 U.S.C. Section 162 (a) as ordinary and necessary business expenses.

Dated: May 21, 1987.

LELAND C. NIELSEN,
Senior United States
District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT A. SIMAY and	)	
FLORA L. SIMAY,	)	No. 87-6188
	)	
Plaintiffs-Appellants,	)	D C No. CV85-1060-N
	)	
vs.	]	MEMORANDUM*
	)	
UNITED STATES OF	)	
AMERICA,	)	
	)	
Defendant-Appellee,	)	
	)	
_____	)	

On Appeal from the United States District Court for the

Southern District of California

Leland C. Nielsen, Senior District Judge Presiding

Submitted: August 15, 1988 **

Filed: October 24, 1988

Before: FLETCHER, PREGERSON, and CANBY,

CIRCUIT JUDGES.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a), 9th Cir. R. 34-4.

Albert Simay (Simay), pro se, appeals the district court's order in favor of the United States following a bench trial. On their amended joint tax return for 1979, the Simays claimed $16,731 as a business deduction for educational expenses incurred during a summer trip to Europe in 1979. Simay contends the district court erred by holding that the Simay's European travels were not deductible as an educational expense.

The district court did not clearly err by finding that the Simay's trip to Europe was not undertaken primarily for the purpose of maintaining or improving his skills as a teacher and were not required as a condition of his salary, status, or employment. See Adelson v. United States, 342 F.2d 332, 334 (9th Cir. 1965); Treas. Reg. S 16205(a) (9167). The district court reviewed the Simay's activities in Europe and found that they were similar to that of any tourist on a sightseeing trip. Although the Simays took an intensive class in French, French was not part of the core curriculum where Mr. Simay taught. Mr. Simay neither discussed his trip

with anyone at his school, nor prepared a written report or any type of presentation. Therefore, the district court did not err by holding that the incurred expenses were not deductible. We affirm.

Before: FLETCHER, PREGERSON, and CANBY,
CIRCUIT JUDGES

Appellant's petition for rehearing, filed November 7, 1988, is hereby denied.

Filed January 25, 1989

Cathy A. Catterson, Clerk

United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT A. SIMAY and	)	
FLORA L. SIMAY,	)	No. 87-6188
	)	
Plaintiffs-Appellants,	)	D C No. CV85-1060-N
	)	
vs.	)	
	)	ORDER
UNITED STATES OF	)	
AMERICA,	)	
	)	
Defendant-Appellee,	)	
	)	
_____	)	

Before: PREGERSON, Circuit Judge.

Appellant's Motion to stay the mandate pending petition for writ of certiorari to the United States Supreme Court is GRANTED. Fed. R. App. P. 41[b].

Filed April 24, 1989

Cathy A. Catterson, Clerk

United States Court of Appeals